

November 7, 2019

Maricopa County Board of Supervisors
Attn: Fran McCarroll, Clerk of the Board
301 West Jefferson Street
Phoenix, Arizona 85003
clerkboard@maricopa.gov

Re: Suspension of Maricopa County Assessor Paul Petersen

To the Maricopa County Board of Supervisors:

We write on behalf of Paul Petersen, the duly elected Assessor of Maricopa County and only lawful occupant of that constitutionally prescribed office. On October 29, 2019, the Board purported to place Mr. Petersen on an unpaid suspension for 120 days for alleged “neglect of duty,” pursuant to Ariz. Rev. Stat. § 11-664(A), and to deprive Mr. Petersen of physical access to the facilities of the Assessor’s Office. The following day, the Board purported to unilaterally vest the powers of Mr. Petersen’s office in an unelected third party.

Section 11-664(C) affords Mr. Petersen the right to a hearing and the Board’s reconsideration of its suspension decision. Unfortunately, the statements and actions of the Board to date evince a process akin to a Soviet show trial—engineered for political exhibitionism, and a result that is never in doubt regardless of the witnesses testimony and constitutional or statutory text. Such a process is beneath the dignity of the board and the rule of law in a free society. Nevertheless, in the interest of exhausting the procedural remedies provided by statute before the issues proceed to a judicial forum, please consider this letter Mr. Petersen’s request for such a hearing and reconsideration.

I. Mr. Petersen Has Never Neglected Any Duty of His Office

The legal denotation of “neglect of duty” aligns with the commonsense meaning of the phrase. Specifically, “neglect of duty is the substantial failure to perform a duty. It ‘impl[ies] wrongdoing, some act of omission or commission in office the law required to be done which was not done or if done was done in an unlawful manner.’” *Arizona Indep. Redistricting Comm’n v. Brewer*, 229 Ariz. 347, 356, ¶ 40 (2012) (quoting *Holmes v. Osborn*, 57 Ariz. 522 (1941)).

The Board cannot identify any function or duty of the County Assessor that “was not done” or that was “done in an unlawful manner.” Instead, the Board attempts to contrive “neglect” from the existence of various emails and files on Mr. Petersen’s work computer that were unrelated to county business, and estimates of the number of hours or days per week that Mr. Petersen may have been physically present at his desk. To posit, however, that Mr. Petersen sent (for example) five official emails in three workdays rather than 500 official emails in five workdays merely evades the only operative question: which specific responsibilities of his office did Mr. Petersen fail to discharge? The Board’s conspicuous silence on this

dispositive point stands in marked contrast to the wealth of affirmative evidence establishing that the statutory functions of the County Assessor's were fully and ably carried out at all times.

For example, upon information and belief, the Chief Deputy Assessor would testify under oath that Mr. Petersen has been consistently engaged with, and attentive to, his duties and the operations of the Assessor's Office. Indeed, the Chief Deputy and Mr. Petersen spoke by telephone on two occasions during the approximately two-week period in which Mr. Petersen was in legal custody, to include a conversation lasting at least thirty minutes in which Mr. Petersen and his Chief Deputy discussed various projects and activities of the Assessor's Office. Although the Chief Deputy has expressed to Mr. Petersen a desire to share his direct observations and personal knowledge with the Board, the County Attorney's Office is contriving roadblocks under Arizona Rule of Professional Responsibility 4.2 and, by extension, obstructing the Chief Deputy's provision of information to our law firm. For this reason, we expect that it will be necessary to compel the Chief Deputy's testimony at the upcoming hearing.

Finally, while the Board is fashioning and applying retroactively new email quotas and office "face time" requirements for the County Assessor, we suggest that the Board should extend these diktats to all elected county officers, to include the Supervisors, on equal terms. In the interests of transparency and public accountability, we invite the Board to publicize logs reflecting all elected county officers' daily arrivals at and departures from county facilities, and to submit all elected county officers' county-issued computers to an audit that will gauge the volume of personal or non-official email and Internet traffic found on those devices. If it was indeed "neglect of duty" for the County Assessor to exceed a certain (as yet unspecified) threshold of personal email correspondence in a given day or to spend fewer than a certain (similarly unspecified) number of hours at his desk in a given week, then surely the voters of Maricopa County are entitled to know whether their other elected officials have engaged in such ostensible improprieties. In the same vein, if Mr. Petersen's recent three-week absence constitutes "neglect of duty," then this designation must necessarily also attach to county officers who take leaves of similar duration for various family or personal reasons. On the other hand, limiting the new standards to only one man, and only retroactively and for one period of time, betrays the fact that it is not a *bona fide* standard at all but a politically convenient pretext. The Board's apparent unwillingness to extend to itself the same standards it has retroactively devised for Mr. Petersen underscores that the suspension process has become a platform for political theater, rather than the fair and dispassionate illumination of facts.

II. Ariz. Rev. Stat. § 11-664 Cannot Be Constitutionally Applied to Mr. Petersen

The Legislature unquestionably can provide for the removal of those who occupy statutorily created positions. *See generally Holmes v. Osborn*, 57 Ariz. 522, 536-37 (1941). The office of County Assessor, however, is of constitutional provenance. *See Ariz. Const. XII, §§ 3, 4*. Indeed, the Constitution contemplates that county bodies will be governed by a board of supervisors acting in partnership with six other coequal constitutional officers. Although the Legislature may allocate various functions and duties to each of these positions in its discretion, the constitutional text bespeaks no hierarchy among these offices and does not bestow upon any of them the prerogative of unilaterally ejecting any of their peers from their elected positions, either directly or via a legislative authorization.¹ In short, the text of the Constitution imparts independent constitutional

¹ As originally enacted in 1912, Article XII, Section 3 established the existence and durational terms of various elected county offices but notably specified that these parameters were "subject to change by law." In 1964, however, the electorate approved an amendment that (among other things) removed this proviso, thereby

vitality to the office of County Assessor and affirms that the powers and duties of that office may be exercised only by the individual lawfully elected by the voters of Maricopa County to a four-year term—to wit, Mr. Petersen.

Further, even assuming *arguendo* that the Legislature can provide for the removal of one constitutional officer by another constitutional officer, history, precedent, and common sense confirm that this extraordinary remedy may be lawfully invoked only to remediate official misconduct. The allegations against Mr. Petersen in the pending criminal proceedings remain not only unproven, but are wholly unrelated to the duties of his office. Mr. Petersen is not alleged to have ever subverted the operations of the County Assessor's office, misappropriated public funds, or otherwise used the powers of his position for any improper purpose. Even assuming that there exist hypothetical circumstances under which the suspension power conferred by Ariz. Rev. Stat. § 11-664 may be constitutionally exercised, it cannot be wielded as a mechanism for expressing political disapproval of unsubstantiated allegations concerning an elected official's personal activities in an outside business enterprise.

III. The Board Cannot Intentionally Create a “Vacancy” in the Assessor’s Office

Finally, even if the Board's 120-day suspension of Mr. Petersen is ultimately countenanced by the courts, this temporary measure cannot be transmuted into a permanent expulsion by virtue of Ariz. Rev. Stat. § 38-291(7), which provides that an office becomes “vacant” when “the person holding the office ceas[es] to discharge the duties of office for the period of three consecutive months.” The vacancy statute is not a backdoor mechanism for the forcible ejection of an elected official. To the contrary, “[i]t is clear from a reading of A.R.S. s 38-291 in its entirety that, apart from those vacancy-creating provisions which are predicated upon death or a prior judicial determination, the remaining vacancy-creating conditions are those which involve voluntary conduct on the part of the office holder.” *Johnson v. Collins*, 11 Ariz. App. 327, 331 (1970). Thus, any interval of time during which Mr. Petersen is constrained by the Board from performing his official duties cannot be deemed a voluntary abandonment of his office for purposes of Ariz. Rev. Stat. § 38-291(7).

In this vein, it bears emphasis that Mr. Petersen is ready, willing, and able to resume exercising the functions of his office. No court order prohibits or restricts his ability to discharge his statutory responsibilities, and he has every intention of completing the four-year term to which the voters of Maricopa County elected him. We hope that the Board chooses to observe the statutory and constitutional confines of its own powers and to subordinate political pique to constitutional duty. If not, however, Mr. Petersen will vindicate his rights and his office in court.

Respectfully,

/s/ *Kory Langhofer*
Kory Langhofer

/s/ *Thomas Basile*
Thomas Basile

Cc: Allister Adel, Maricopa County Attorney

insulating these offices from legislative attempts to eliminate them, reduce their terms, or expel lawfully elected incumbents.